



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISII**

**ELC CASE NO. 1079 OF 2016**

**DANIEL NYABARO OMWEGA.....1<sup>ST</sup> PLAINTIFF**

**ELIZABETH BOCHERE.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**KENNEDY OMWEGA MAGACHI..... DEFENDANT**

**JUDGMENT**

**INTRODUCTION**

1. The Plaintiffs are the registered owners of land parcel number MAJOGE KANYIMBO/385 having been so registered through transfer by transmission pursuant to Kisii HC Succession Cause No. 366 of 1993. In 1993, the Defendant filed suit against the Plaintiffs claiming the suit land but the case was dismissed on 9<sup>th</sup> September 1998. The Defendant thereafter filed a case at Ogembo Land Disputes Tribunal claiming a portion of the suit land and the Tribunal gave an award in the Defendant's favour. The said award was adopted as a judgment of the Court vide Ogembo PM Misc Application No. 26 of 2011. Before the said judgment could be implemented, the Plaintiffs filed the instant suit against the Defendant seeking a declaration that the Award by Ogembo Land Disputes Tribunal and the adoption of the same by Ogembo Senior Principal Magistrate's Court was null and void for lack of jurisdiction. He also obtained an order staying execution of the said decree.

2. The Defendant filed a defence dated 11<sup>th</sup> December 2012 denying the Plaintiff's claim. The suit was set down for hearing on 25.2.2020 but despite being served with a hearing notice, the Defendant did not attend court. The case therefore proceeded ex-parte.

**PLAINTIFF'S CASE**

3. The Plaintiff testified that the 2<sup>nd</sup> Defendant who had passed away in 2019 was his mother. He told the court that the suit property had been registered in his mother's name before it was transferred to his name. He stated that the Defendant first filed a case against him and his mother vide Kisii HCCC No. 88 of 1993 but the said case was dismissed. He produced a copy of the proceedings in respect of the said case as Plaintiff's exhibit 1. The Defendant later filed a case at Ogembo Land Disputes Tribunal and the Tribunal gave an award in the Defendant's favour. He produced the proceedings in Ogembo Land Disputes Tribunal Case No. 9 of 2010 as Plaintiff's exhibit 2. He also produced the proceeding in Ogembo SPM Miscellaneous Civil Application No. 26 of 2011 adopting the Tribunal's award as a judgment of the court as Plaintiff's exhibit 3. He produced a certificate of official search dated 2.11.2016 indicating that the suit land was registered in his name. He prayed that the decision of the Tribunal be set aside as the Tribunal had no jurisdiction to hear and determine the matter.

4. In his submissions dated 5<sup>th</sup> March 2020 counsel for the Plaintiff submitted that the Land Disputes Tribunal had no jurisdiction to deal with registered land. It was his further submission that the High Court had already dismissed the suit filed by the Defendant against the Plaintiffs. He therefore urged that judgment be entered for Plaintiff as prayed in the Plaintiff's prayer.

**ANALYSIS AND DETERMINATION**

5. The only issue for determination is whether the Plaintiff is entitled to the reliefs sought.

It is not in dispute that the Ogembo Land Disputes Tribunal gave an award in favour of the Defendant and held that the Defendant was entitled to inherit a portion of his late father's land. The Tribunal further directed that land parcel number MAJOGE/KANYIMBO/385 be sub-divided into two portions following the old prominent landmarks and that one portion of the suit land be transferred to the Defendant. The said award was adopted as judgment of the court vide Ogembo SPM Miscellaneous Civil Application No. 26 of 2011. It is this judgment that the Plaintiff has now challenged on the grounds that the Tribunal had no jurisdiction and therefore the court's adoption of the same as a

judgment of the court was a nullity.

6. Section 47 of the Evidence Act provides that a decision of the court may be impeached on grounds of jurisdiction or fraud. The said section provides as follows:

Section 47:

*“Any party to a suit or other proceeding may show that any judgment, order or decree which is admissible under the provisions of this Act and which has been proved by the adverse party was delivered by a court not competent to deliver it or was obtained by fraud”.*

Additionally, Order 3 Rule 9 of the Civil Procedure Rules provides as follows:

*“No suit shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby and the court may make a binding declaration of rights whether any consequential relief is or could be claimed or not.*

7. In the case of **Joana Nyokwoyo Buti v Walter Rasugu Omariba (2011) eKLR** the Court of Appeal held as follows:

*“A declaration or declaratory judgment is an order of the court which merely declares what the legal rights of the parties to the proceeding are and which has no coercive force- that is it does not require anyone to do anything. It is available both in private and public law save in judicial review jurisdiction at the moment. The rule gives general power to the court to give a declaratory judgment at the instance of a party interested in the subject matter regardless of whether or not the interested party had a cause of action in the subject matter. In the present case the 1<sup>st</sup> Respondent sought a declaration in essence that the decision of the tribunal was unlawful as it was made without jurisdiction. If such a declaration is granted, the result will be that the decision of the tribunal would be a nullity. The 1st Respondent was not a party to the tribunal proceedings. The decision of the Tribunal came to his notice long after the 30 days stipulated by section 8 (1) of the Land Disputes Tribunal Act for appealing to the Provincial Appeal’s Committee had elapsed, and also long after the six months stipulated for seeking a judicial review remedy of an order of certiorari had expired. It is true that the 1<sup>st</sup> Respondent filed a judicial review application but it was dismissed on the ground that the application for leave was made outside the stipulated six months. Since the application for judicial review was not determined on the merits, the doctrine of res judicata does not apply. Moreover, although the Resident Magistrate’ Court entered judgment in accordance with the decision of the tribunal, such a judgment could be challenged in fresh proceedings if obtained by fraud or mistake etc –See paragraph 1210 of Halsbury’s Laws of England, 4<sup>th</sup> Edition – reissue page 353. In **Jonesco v Beard (1930AC 293)** the House of Lords held that the proper method of impeaching a complete judgment on the ground of fraud is by action which decision was followed in **Kuwait Airways Corporation v Araqi Airways Co & Another (No. 2) [2001] 1WLR 429**. The decision of the Tribunal has of course been merged in the judgment of the magistrate’s court.”*

8. It is therefore clear that the court can make a declaratory order nullifying a decision based on an award by a Tribunal that had no jurisdiction. From the foregoing it is my finding that the Plaintiffs have proved their case on a balance of probabilities and I accordingly enter judgment in favour of the Plaintiffs and make the following final orders:

- a) A declaration is hereby issued that both the award by the Ogembo Land Disputes Tribunal and the adoption of the same by Ogembo Senior Principal Magistrate’s Court are null and void for lack of jurisdiction.
- b) The costs of this suit shall be borne by the Defendant.

**Dated, signed and delivered in open court at Kisii this 29<sup>th</sup> day of September 2020.**

**J.M ONYANGO**

**JUDGE**